

FILED  
530 08 JUN -4 PM 4:39  
CLERK OF DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

Name CRUZ MATTHEW  
(Last) (First) (Initial)

Prisoner Number F-03927

Institutional Address P.O. BOX 409060, MULE CREEK STATE PRISON  
IONE, CA. 95640

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

MATTHEW CRUZ,  
(Enter the full name of plaintiff in this action.)

vs.

RICHARD SUBIA, (Warden),

(Enter the full name of respondent(s) or jailor in this action)

**CV 08**

**2793**

Case No. \_\_\_\_\_  
(To be provided by the clerk of court)

**PETITION FOR A WRIT  
OF HABEAS CORPUS**

**E-filing**

**(PR)**

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

PET. FOR WRIT OF HAB. CORPUS

- 1 -

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

## 1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

SONOMA CO. SUPERIOR COURT

SANTA ROSA, CA.

Court

Location

- (b) Case number, if known MCR 448576

- (c) Date and terms of sentence 11/6/05; 13 YRS. 4 MOS.

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes X No

Where?

Name of Institution: MULE CREEK STATE PRISONAddress: P.O. BOX 400000, IONE, CA.

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Count 1: Voluntary Manslaughter (P.C. § 192; Count 2: Participation

In A Criminal Street Gang (P.C. § 186.22(a)); Count 3: Assault With

Force (P.C. § 245(a)(1): Weapons Use (P.C. § 12022(b)).



1 petition? Yes \_\_\_\_\_ No \_\_\_\_\_

2 (c) Was there an opinion? Yes \_\_\_\_\_ No \_\_\_\_\_

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes \_\_\_\_\_ No \_\_\_\_\_

5 If you did, give the name of the court and the result:

6 \_\_\_\_\_

7 \_\_\_\_\_

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to

9 this conviction in any court, state or federal? Yes \_\_\_\_\_ No \_\_\_\_\_

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that  
 11 challenged the same conviction you are challenging now and if that petition was denied or dismissed  
 12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit  
 13 for an order authorizing the district court to consider this petition. You may not file a second or  
 14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28  
 15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following  
 17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: SONOMA CO. SUPERIOR COURT

19 Type of Proceeding: HABEAS CORPUS

20 Grounds raised (Be brief but specific):

21 a. SAME AS RAISED HEREIN

22 b. \_\_\_\_\_

23 c. \_\_\_\_\_

24 d. \_\_\_\_\_

25 Result: DENIED Date of Result: 10/1/07

26 II. Name of Court: CAL. COURT OF APPEAL, FIRST DIST.

27 Type of Proceeding: HABEAS CORPUS

28 Grounds raised (Be brief but specific):

1 a. SAME AS RAISED HEREIN  
 2 b.  
 3 c.  
 4 d.  
 5 Result: DENIED Date of Result: 10/24/07

6 III. Name of Court: CALIFORNIA SUPREME COURT  
 7 Type of Proceeding: HABEAS CORPUS  
 8 Grounds raised (Be brief but specific):  
 9 a. SAME AS RAISED HEREIN  
 10 b.  
 11 c.  
 12 d.  
 13 Result: DENIED Date of Result: 4/23/08

14 IV. Name of Court:  
 15 Type of Proceeding:  
 16 Grounds raised (Be brief but specific):  
 17 a.  
 18 b.  
 19 c.  
 20 d.  
 21 Result: Date of Result:

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?  
 23 Yes No ☒  
 24 Name and location of court:

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to  
 27 support each claim. For example, what legal right or privilege were you denied? What happened?  
 28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.  
 2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent  
 3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,  
 4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: AS SET FORTH BELOW  
 6

7 Supporting Facts:  
 8  
 9  
 10

11 Claim Two:  
 12

13 Supporting Facts:  
 14  
 15  
 16

17 Claim Three:  
 18

19 Supporting Facts:  
 20  
 21  
 22

23 If any of these grounds was not previously presented to any other court, state briefly which  
 24 grounds were not presented and why:

25  
 26  
 27  
 28



1 List, by name and citation only, any cases that you think are close factually to yours so that they  
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning  
3 of these cases:

4 \_\_\_\_\_  
5 \_\_\_\_\_  
6 \_\_\_\_\_

7 Do you have an attorney for this petition? Yes \_\_\_\_\_ No X

8 If you do, give the name and address of your attorney:

9 \_\_\_\_\_

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in  
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12  
13 Executed on 5-23-08

14 Date

Matthew Cruz

Signature of Petitioner

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20 (Rev. 6/02)

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26  
27  
28 6-A

PET. FOR WRIT OF HAB. CORPUS

2004 Supp. App. 14-B, p.31

1 THE ISSUES HEREIN ARE PROPERLY PRESENTED:

2 The issues raise herein are properly presented to this court in a petition  
3 for writ of habeas corpus in that petitioner is seeking remedy for denial  
4 of fundamental constitutional rights and errors in sentencing which constitute  
5 a denial of constitutional due process of law and the right to trial.

6 This petition is timely brought: Under the Antiterrorism and Effective  
7 Death Penalty Act of 1996 (AEDPA) a petitioner seeking federal habeas corpus  
8 relief must file within one year from the latest of the following dates:

9 The conclusion of direct review or expiration of the time for seeking  
10 review;

11 The recognition by the Supreme Court of a new constitutional right that  
12 has been made retroactively applicable to cases on collateral review;

13 .....

14 First: The claims presented herein are based upon the holding of the  
15 United States Supreme Court's decision as set forth in *Cunningham v. Califor-*  
16 *nia*, (2007 \_\_\_ U.S. \_\_\_ [127 S.Ct. 856] which was decided on January 22,  
17 2007. Both state and federal courts have held that the finality date for  
18 a successful claim pursuant to *Cunningham v. California*, *supra*, is the date  
19 *Apprendi v. New Jersey* (2000) 530 U.S. 466 was decided. See *People v. Rosen*  
20 (2007) \_\_\_ Cal. App.4th \_\_\_. WL9000765; and, *Reed v. Schriro*, (2007) \_\_\_  
21 *F.Supp.2d* \_\_\_. WL521016. Thus the matters presented herein are properly  
22 presented for collateral review under the "Teague/Lane Rule". See *Teague*  
23 *v. Lane* (189) 489 U.S. 228.

24 Second: The matters addressed pertain to sentencing only and do not  
25 effect findings of guilt of the charged offenses. Petitioner herein seeks  
26 correction of an unauthorized portion of his sentence. In the State of Calif-  
27 ornia there is no time limit for seeking review of an unauthorized sentence



1 : People v. Scott (1994) 9 C4th 331, 354. Therefore, petitioner asserts that  
2 his one year time limit under the AEDPA did not begin until 90 days (Time  
3 period for Writ of Cert.) after the denial of his habeas corpus writ in the  
4 California Supreme Court dated 4/23/08. See attached.

5 INCORPORATION OF RECORDS AND DOCUMENTS:

6 Petitioner hereby incorporates into this petition all documents appended  
7 hereto and/or identified as exhibits and which are offered in support of  
8 this petition. Petitioner further hereby incorporates into this petition  
9 all documents, records and transcripts of proceedings in this case which  
10 are presently on file in the sentencing court in case number MCR 448576.

11 REQUEST FOR LIBERAL CONSTRUCTION AND INTERPRETATION:

12 Petitioner hereby requests leave of this Honorable Court to file this  
13 petition with liberal interpretation and construction standards pursuant  
14 to the holding of the United States Supreme Court in **Hains v. Kerner**, 404  
15 U.S. 519; and, **Boag v. McDougal**, 454 U.S. 364.

STATEMENT OF THE CASE

Petitioner was taken into custody after he presented himself to the Santa Rosa Police Department and reported that he had been involved in a fight which may have resulted in a death.

Subsequently petitioner was initially charged as follows:

Count 1: Second Degree Murder (P.C. § 189 <sup>1</sup>.).

Count 2: Participation In A Criminal Street Gang (P.C. § 186.22(a)).

Count 3: Assault With Force Likely To Produce Great Bodily Injury (P.C. § 245(a)(1)).

The arrest occurred on September 7, 2004.

On November 15-16, 2004 a preliminary hearing was held after which petitioner was held to answer on the above charges. Information was filed in the Superior Court alleging the above counts and adding a Weapons Use allegation to Count 1 pursuant to P.C. § 12022(b) (knife).

The matter proceeded to trial. On the third day of trial the People offered the Petitioner a plea offer which he accepted. The agreement stipulated that Count 1 would be amended from Second Degree Murder to Voluntary Manslaughter (P.C. § 189). Petitioner would plead guilty to Count 1, nolo contendere to Counts 2 and 3 and admit the weapons use enhancement for a sentencing exposure no greater than 13 years and 8 months. Petitioner's date of conviction is 9/1/04. See Petitioner's

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1. All statutory references are to the Penal Code unless otherwise indicated. All references to statutes and rules are to those as they existed during the time period relevant to matters presented herein.

1 Exhibit A, a true and correct copy of the Abstract Of Judgment  
2 in this case.

3 On November 11, 2004 petitioner was sentenced to an aggre-  
4 gate term of imprisonment of 13 years and 8 months and pay a  
5 restitution fine in the amount of \$8,400. See Petitioner's  
6 Exhibit B, a true and correct copy of the Reporter's Transcript  
7 of sentencing proceedings in this matter.

8 Petitioner filed no notice of appeal.  
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STATEMENT OF RELEVANT FACTS OF THE CASE

On September 7, 2004, at approximately 12:52 AM, officers were dispatched to Kaiser Hospital in regard to a stabbing that had occurred in the area of Piner Road and Coffey Lane in Santa Rosa California. The victim Ricardo Abadilla, suffered a single stab wound to his chest which had punctured his heart. Abadilla died at the hospital. Abadilla was 23 years old at the time.

Investigation revealed that Abadilla had been at a party on Waltzer Road in which approximately 20 Norteno gang members from South Park attended. Around 9:00 PM on September 6, 2004, the petitioner and Abadilla got into a fight in the garage of the residence. Other people at the party separated the two. Prior to the start of the fight, Abadilla told Cruz (Petitioner) "to back down". Neither Cruz nor Abadilla suffered any injury as a result of the initial fight. After the fight, they shook hands. A few hours later, Cruz instigated a second fight against Abadilla. Cruz stabbed Abadilla with a knife. Abadilla yelled out that he had been stabbed and that Cruz had a knife. Cruz then walked away and Abadilla was given a ride to the hospital. Abadilla was conscious when he was taken to the hospital and it was noted he was bleeding from his chest.

On September 7, 2004, at approximately 3:25 AM, the petitioner went to the Santa Rosa Police Department stating he was involved in a fight that might have resulted in death. When initially interviewed, he stated he arrived at the party on Waltzer Road around 3:00 PM with an 18-pack of beer. He consumed alcohol throughout the party. Around 7:00 PM, Abadilla arrived

1 at the party and Cruz noted he had been having problems with  
2 Abadilla because of an issue between Abadilla and Cruz's broth-  
3 er. Cruz and Abadilla engaged in a fight inside of the garage  
4 of the residence. Throughout the rest of the party, they argued.  
5 Later that evening they engaged in another fight outside of  
6 the residence. Abadilla was pounding him with his fists and  
7 Cruz used his arm and hands to protect himself. Abadilla backed  
8 away stating that he needed to go to the hospital. Cruz denied  
9 stabbing the victim and denied being in possession of a knife.  
10 Cruz had swelling on the left side of his face and head, includ-  
11 ing his jaw , eye, and head. He was informed that Abadilla had  
12 died.

13 During a subsequent interview, the petitioner made the  
14 same claims adding additional information that he did not want  
15 to fight Abadilla initially, but accepted Abadilla's challenge  
16 anyway. While at the party, after the initial fight, he began  
17 to feel uncomfortable and called his cousin for a ride. As he  
18 was leaving, Abadilla confronted him on the street and wanted  
19 to fight again. He did not want to fight, but Abadilla began  
20 pushing him. Abadilla would not stop hitting him and no one  
21 watching would break up the fight. Cruz became scared and pulled  
22 a knife out of his pocket and stabbed Abadilla in an attempt  
23 to get him off of him and to stop the hitting. After Cruz stabbed  
24 Abadilla the victim backed away and asked to be taken to the  
25 hospital. As Cruz was being driven home he threw the knife out  
26 of the window of the vehicle.

27 During a search of the petitioner's residence, detectives

1 found letters written to the petitioner from his brother. In  
2 those letters he directed Cruz to "jump" another gang member.  
3 He further told the petitioner to do something "right away"  
4 about the problem with L.N. and "Ricky". He identified L.N.  
5 and "Ricky" as cowards in that they did not have the right to  
6 disrespect the gang. His brother also wrote about the night  
7 in which Cruz was disrespected and was "jumped" by cowards.  
8 There was gang writing in the letters including, "South Park  
9 Northenos". Two red bandannas were located in the same dresser  
10 drawer as well as several other red pieces of clothing. A folding  
11 knife was also located, Several photographs were located in  
12 the residence with Northeno gang members posing and throwing  
13 hand gang signs. Cruz was in several of those photographs.

14 Based on the autopsy performed on Abadilla on September  
15 28, 2004, the coroner determined the immediate cause of death  
16 to be "stab wound of chest". The coroner also noted Abadilla  
17 had abrasions on his face, on his right shoulder, contusions  
18 on his right arm, and right groin area all consistent with him  
19 being involved in a fight. The detective noted that when the  
20 defendant was interviewed his blood alcohol content was .07%  
21 and his blood later tested positive for THC.

22 The facts set forth above are taken directly from the  
23 Presentencing Report filed in this case, whose facts, in turn,  
24 stem from Santa Rosa Police Department Report No. 04-17161 and  
25 Transcripts of the Preliminary Hearing of this matter. Petition-  
26 er's Exhibit C is a true and correct copy of said Presentencing  
27 Report.



1       The case proceeded to a trial in which the prosecution  
2 spent three days presenting it's case against the petitioner.  
3 Before the defense had the opportunity to respond to the prose-  
4 cution's case and present rebutting evidence, the prosecution  
5 offered the petitioner a plea bargain which stipulate to a  
6 sentencing exposure no greater than 13 years and 8 months.  
7 Petitioner, upon advice of counsel, accepted the offer in order  
8 to avoid the potential for a sentencing exposure of 15 years  
9 to life or greater.

10       Had the trial proceeded the defense would have presented  
11 evidence that Abadilla left the party after the initial fight  
12 with petitioner and returned with some of his friends as "back  
13 up" with the intent to continue the earlier fight between he  
14 and Petitioner. Abadilla was the aggressor.

15       Sentencing:

16       The Court imposed sentence as follows:

17               The sentence will be computed as fol-  
18 lows: As to Count I, the violation of 192  
19 of the Penal Code, I'm imposing the high  
20 term based on the factors in aggravation  
21 and in particular your prior convictions  
22 and the fact you were on a conditional  
sentence at the time of the offense, and  
the nature of your conduct, to a term of  
11 years. There will be an enhancement for  
using the knife or 1 year, for a total of  
12 years.

23               On Count II, a violation of 186.22(a)  
24 of the Penal Code, I am imposing one third  
25 of the midterm consecutively, and for Count  
26 III, violation of 245(a)(1) of the Penal  
27 Code, I am imposing one third of the midterm  
consecutively, which is a term of 1 year.  
So the total aggravated term is 13 years  
8 months. And I'm imposing consecutive  
sentencing based on the differing nature

of the crimes and also upon the stipulation  
that was entered into in regard to sentencing.  
(RT 14:12-26, See Ex. B)

ARGUMENT

CLAIM I: PETITIONER WAS DENIED HIS RIGHT TO A JURY TRIAL UPON FACTS NECESSARY TO IMPOSE A SENTENCE BEYOND THE STATUTORY MAXIMUM AUTHORIZED BY THE VERDICT OF THE JURY AT TRIAL OR BY PLEA OF GUILTY TO THE CHARGED OFFENSES IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND; ARTICLE I, §§ 15 AND 24 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA

Controlling Principals Of Law:

"Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Windship*, 397 U.S. 358, at 364 (1970)

"As we made clear in *Windship*, the 'reasonable doubt' requirement 'has [a] vital role in our criminal procedure for cogent reasons.' 397 U.S., at 363" [citation omitted] "prosecution subjects the criminal defendant both to 'the possibility that he may lose his liberty upon conviction and...the certainty that he would be stigmatized by the conviction.' *Ibid*. We thus require this, among other, procedural protections in order to 'provid[e] concrete substance for the presumption of innocence.' and to reduce the risk of imposing such deprivations erroneously. *Ibid*. If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not -- at the moment the State is put to proof of those circumstances -- be deprived of protections that have, until that point, unquestionably attached." *Appendi v. New Jersey*, 530 U.S. 466, at 484.

1 "...., in *Mullaney v. Wilber*, supra,"  
 2 (*Mullaney v. Wilber* (1975) 421 U.S. 684)  
 3 "we unanimously extended *Windship*'s protect-  
 4 ions to determinations that went not to  
 5 a defendant's guilt or innocence, but to  
 6 the length of his sentence. 'If *Windship*',  
 7 we said, 'were limited to those facts that  
 8 constitute a crime as defined by state  
 9 law, a State could undermine many of the  
 10 interests that decision sought to protect  
 11 without effecting any substantive change  
 12 in its law. It would only be necessary  
 13 to redefine the elements that constitute  
 14 different crimes, characterizing them as  
 15 factors that bear solely on the extent  
 16 of punishment.'" Quoting from Justice  
 17 Scalia's Dissenting Opinion in *Almendarez-*  
 18 *Torres v. United States* (1998) 523 U.S.  
 19 224 and as cited with approval in *Apprendi*  
 20 *v. New Jersey*, supra, at 484.

21 "Our precedents make clear....that the  
 22 'statutory maximum' for *Apprendi* purposes  
 23 is the maximum sentence a judge may impose  
 24 solely on the basis of the facts reflected  
 25 in the jury verdict or admitted by the  
 26 defendant....In other words, the relevant  
 27 'statutory maximum' is not the maximum  
 sentence a judge may impose after finding  
 additional facts, but the maximum he may  
 impose without any additional findings.  
 When a judge inflicts punishment that the  
 jury's verdict alone does not allow, the  
 jury has not found all the facts 'which  
 the law makes essential to the punishment,'  
 ...and the judge exceeds his proper author-  
 ity." *Id.*, at 303 (emphasis in original)  
 (quoting 1 J. Bishop, *Criminal Procedure*  
 § 87, p. 55 (2d ed. 1872))." *Cunningham*  
*v. California*, on cert., No. 05-6551, 543  
 U.S. \_\_\_\_ (2007), from Slip Opinion, pp.  
 10-11, decided January 22, 2007.

¶ "California's determinate sentencing law  
 (DSL) assigns to the trial judge, not to  
 the jury, authority to find the facts that  
 expose a defendant to an elevated "upper  
 term" sentence. The facts so found are  
 neither inherent in the jury's verdict  
 nor embraced by the defendant's plea, and  
 they need only be established by a prepon-  
 derance of the evidence, not beyond a  
 reasonable doubt. The question presented

1 is whether the DSL, by placing sentencing-  
2 evaluating factfinding within the judge's  
3 province, violates a defendant's right to  
4 trial by jury safeguarded by the Sixth and  
Fifteenth Amendments. We hold that it does."  
**Cunningham v. California, supra**, Slip  
Opinion at page 1.

5  
6 **A. California's Determinate Sentencing Law (DSL)**

7 **(1) Aggravated Terms.**

8 California's Determinate Sentencing Law permits a triad  
9 of sentencing choices. Penal Code § 1170, subsection (a)(3).  
10 Each statute defining an offense either states the applicable  
11 triad of terms expressly, or provides for a commitment "to state  
12 prison", in which case the applicable triad is 16 months, two  
13 years, or three years in state prison. See Penal Code § 18.  
14 The statute at issue in the instant matter defines Voluntary  
15 Manslaughter as: "...the unlawful killing of a human being without  
16 malice.....upon a sudden quarrel or heat of passion". See Penal  
17 Code § 192(a). Voluntary Manslaughter is punishable by imprison-  
18 ment in state prison for three, six, or eleven years. See Penal  
Code § 193(a).

19 Penal Code section 1170(b) mandates the court to select  
20 the middle term unless there are mitigating or aggravating  
21 circumstances. See **People v. Jackson**, 196 Cal.App.3d 380, 391  
22 (1987); **People v. Leung**, 5 Cal.App.4th 482, 508 (1992). Califor-  
23 nia Rules of Court, rule 4.420(a) provides, in pertinent part:

24 When a judgment of imprisonment is to be  
25 imposed and the statute specifies three  
26 possible terms, the court shall order  
27 imposition of the middle term, unless there  
are circumstances in aggravation or mitiga-  
tion of the crime...



1 The implementing provision, California Rules of Court,  
2 rule 4.420 specifies that circumstances in aggravation shall  
3 be established by the preponderance of the evidence.

4 (a) ...) The middle term shall be select-  
5 ed unless imposition of the upper or  
6 lower term is justified by circumstances  
7 in aggravation or mitigation.

8 (b) Circumstances in aggravation shall  
9 be established by a **preponderance of**  
10 the evidence. Selection of the upper  
11 term is justified only if, after con-  
12 sideration of all the relevant facts,  
13 the circumstances in aggravation out-  
14 weigh the circumstances in mitigation.  
15 The relevant facts are included in the  
16 case record, the probation officer's  
17 report, other reports and statements  
18 properly received, statements in aggr-  
19 avation or mitigation, and any further  
20 evidence introduced at the sentencing  
21 hearing...

22 (d) A fact that is an element of the  
23 crime shall not be used to impose the  
24 upper term.

25 (e) The reasons for selecting the upper  
26 or lower term shall be stated orally  
27 on the record, and shall include a  
concise statement of the ultimate facts  
which the court deemed to constitute  
circumstances in aggravation or miti-  
gation justifying the term selected.  
[Emphasis added]

Because California expressly forbids the dual use of facts  
included in the element of the offense to impose the aggravated  
term, the Determinate Sentencing Law necessarily requires facts  
beyond those determined by the jury. See California Rules of  
Court, rule 4.420 (d). In recognition of this fact the United  
States Supreme Court observed the following in **Cunningham v.**  
**California, (2007) \_\_\_\_ U.S. \_\_\_\_ [127 S.Ct 856]:**



1 ¶"Under California's DSL, an upper term  
2 sentence may be imposed only when the trial  
3 judge finds an aggravating circumstance.  
4 See *supra*, at 4-5. An element of the charged  
5 offense, essential to a jury's determination  
6 of guilt, or admitted in a defendant's  
7 guilty plea, does not qualify as such a  
8 circumstance. See *supra*, 5-6." *Cunningham*  
9 *v. California*, *supra*, Slip Opinion at page  
10 15.

11 In *People v. Black II* (7/19/07) DJAR 11041) (Black II),  
12 the California Supreme Court attempts to salvage California's  
13 Determinate Sentencing Law by fashioning a rationale of the  
14 Cunningham decision which is distinguishable to the facts of  
15 that specific case and contain circumstances which are not common  
16 to criminal proceedings in California.

17 The defendant in Black II went to jury trial on information  
18 which charged him with one count of continuous sexual abuse of  
19 a child in violation of P.C. § 288.5, involving victim T.R.,  
20 and two counts of lewd and lascivious conduct with a child in  
21 violation of P.C. § 288(a), involving victims A.T. and H.T.  
22 The information alleged that count one was committed by use  
23 of "force, violence, duress, menace, and fear of immediate and  
24 unlawful bodily injury", a fact which is not an element of the  
25 offence of P.C. § 288.5. Therefore, in the Black case the jury  
26 was asked to, and did, determine facts beyond a reasonable doubt  
27 which are not necessary elements of the charged offense but  
which do qualify as an aggravating fact. This is an unusual  
occurrence and turns on the charging Information, The common  
procedure in California is for the charging Information to limit  
its contents to identifying the Court and the Parties involved,

1 and identifying the Public Offense committed. (See P.C. §§ 950,  
2 951, and 953) Almost never does the charging Information contain  
3 facts not essential to be proved. (See P.C. § 953) Most often,  
4 this is limited to the essential elements of an offense. The  
5 Black case is distinguishable in this regard, and may very well  
6 pass the constitutional scrutiny of Cunningham. But almost no  
7 other case will.

8 The Black II Court went on to explain that if one aggravat-  
9 ing factor passed constitutional muster then the sentencing  
10 court was free to apply as many aggravating facts as it found  
11 by a preponderance of the evidence in order to exceed the stat-  
12 utory maximum middle term and impose the aggravated term. This  
13 is an erroneous conclusion for the following reasons:

14 If the sentencing court imposed an aggravated term based  
15 upon three distinctive aggravating factors, only one of which  
16 is constitutional pursuant to Cunningham....which one was the  
17 determinative factor which actually persuaded the Court to  
18 impose the aggravated term? Was the determinative aggravating  
19 factor constitutionally found? In answering this question petit-  
20 ioner directs the court's attention to a Federal Court Judge  
21 who was asked to formulate guidelines for determining whether  
22 an actors motivations for recording confidential conversations  
23 ran afoul of the federal statute:

24 I conclude that, properly interpreted,  
25 § 2511(2)(d) forbids the recording of com-  
26 munications between private persons by  
27 or with the consent of one of the parties  
when it is shown either (1) that the primary  
motivation, or (2) that a determinative  
factor in the actor's motivation for

1 intercepting the conversation was to commit  
 2 a criminal, tortious, or other injurious  
 3 act. ...., this reading takes into account  
 4 the complexity of human motivation and  
 5 reflects a common sense understanding of  
 6 "the purpose." The first branch of this  
 7 two-part standard ("primary" motivation)  
 8 is supported by the opinion on the second  
 9 appeal of Phillips, where the court stated  
 10 that "[a]lthough Overton admitted that  
 11 use of the tape to publicly embarrass  
 12 Phillips if he went back on his word was  
 13 a 'far-fetched possibility,' the subsequent  
 14 failure to so use the tape reinforces the  
 15 finding that the primary purpose for making  
 16 it was to obtain a record of what was said."  
 17 564 F.2d at 34 (emphasis added). The second  
 18 branch of the standard ("a determinative  
 19 factor") is supported by precedents in  
 20 other areas of the law where courts are  
 21 often faced with circumstances of mixed  
 22 motives. For example, when considering  
 23 violations of the federal statutes pro-  
 24 hibiting race, sex or age discrimination  
 25 in employment, the courts frequently must  
 26 determine whether a forbidden motive was  
 27 "a determinative factor" in the firing.  
 E.g. *Monterio v. Poole Silver Co.*, 615  
 F.2d 4, 9 (1st. Cir. 1980) (race discrim-  
 ination)" *United States v. Vest* (1986)  
 639 F.Supp. 899, 904-905. Aff'd 813 F.2d  
 477. Cert/ den. (1988) 488 U.S. 965.)

17 When a sentencing court is allowed to act with mixed motives  
 18 for imposing a sentence beyond the statutory maximum all factual  
 19 findings must pass constitutional scrutiny. "...the Due Process  
 20 Clause protects the accused against conviction except upon proof  
 21 beyond a reasonable doubt of every fact necessary to constitute  
 22 the crime with which he is charged." *In re Windship*, 397 U.S.  
 23 358, 364 (1970)

24 In the instant matter the sentencing court recited three  
 25 factors in aggravation:

26 "The sentence will be computed as fol-  
 27 lows: As to count I the violation of 192

1 of the Penal Code , I'm imposing the high  
2 term based on the factors in aggravation  
3 and in particular your prior convictions  
4 and the fact you were on a conditional  
sentence at the time of the offense, and  
the nature of your conduct, to a term of  
11 years." Ex. B at p. 14:12-17.

5 The above sentencing factors may arguably be sufficient  
6 to impose a term within the statutory maximum range...but not  
7 to exceed it.<sup>2</sup>.

8 "You were on a conditional sentence at the time of the  
9 offense" implicates the use of rule 4.421(b)(5) [The defendant's  
10 prior performance on probation or parole was unsatisfactory.]  
11 as an aggravating factor. This is a subjective determination  
12 requiring additional factfinding beyond those facts encompassed  
13 by petitioner's plea. Petitioner had successfully completed 15  
14 months of an 18 month period of informal probation which was  
15 imposed for the crime of Public Intoxication. Up until the date  
16 of the current offense there is no indication that petitioner  
17 had not successfully complied with all of the conditions of  
18 that probation. An enhanced sentence based upon such factual  
19 determinations violate Cunningham's constitutional mandate.

20 "...the nature of your conduct,". What does that mean?  
21 Petitioner plead guilty to the offense of Voluntary Manslaughter  
22 in Count 1 of the Information. Voluntary Manslaughter is the  
23 taking of a human life without malice; where one acts in the  
24 heat of passion; or, in unreasonable self-defense; or acts with  
25 conscious disregard for life but with no intent to kill. See  
26 2. Erroneous utilization of prior convictions to impose a  
27 sentence in excess of the statutory maximum is argued below.

1 People v. Parras (2005) 27 Cal.Rptr.3d 567. Does the Court mean  
2 the petitioner's conduct in taking a human life? If so, this  
3 is prohibited by rule 4.420(d) of the California Rules of Court  
4 which prohibits the use of a fact that is an element of the  
5 offense from being used to aggravate a sentence. If not, then  
6 it encompassed a factual determination of facts not encompassed  
7 by petitioner's plea and violates Cunningham. One can't help  
8 but to speculate that the sentencing judge (who was also the  
9 trial judge in this matter) may have based this portion of the  
10 aggravated findings upon evidence which was presented during  
11 the three days of trial which proceeded the change of plea.  
12 Evidence which was left unmitigated because the trial ended  
13 before such evidence was presented. This would encompass factual  
14 determinations effecting the sentence in violation of Cunningham.  
15 Further, it must be noted that the Presentence Report notes  
16 that there are no circumstances in aggravation pursuant to rule  
17 4.421(a) of the Rules of Court: Facts relating to the crime.  
18 See Ex C at p. 7.

19  
20 (2) Consecutive Sentencing:

21 Like the sentencing scheme relating to the imposition of  
22 the aggravated term, in California the imposition of consecutive  
23 terms involves judicial fact-finding by a preponderance of the  
24 evidence standard.

25 California Penal Code section 669 governs the imposition  
26 of most consecutive sentences. It provides in pertinent part:  
27



1 (a) When any person is convicted of two  
2 or more crimes, whether in the same  
3 proceeding or court or in different pro-  
4 ceedings or court, and whether by judgment  
5 rendered by the same judge or by different  
6 judges, the second or other subsequent  
judgment upon which sentence is ordered  
to be executed shall direct whether the  
terms of imprisonment or any of them to  
which he or she is sentenced shall run  
concurrently or consecutively..."

7 Actual imposition of a consecutive sentence is governed  
8 by Penal Code § 1170.1 which sets forth the manner of calculat-  
9 ing and determinations to impose consecutive sentences. Penal  
10 Code section 1170(d) states, in pertinent part:

11 The court shall also impose any other  
12 additional term which the court determines  
13 in its discretion or as required by law  
14 shall run consecutive to the term imposed  
15 under 1170. In considering the imposition  
of such additional term, the court shall  
apply the sentencing rules of the Judicial  
Counsel. (Emphasis added)

16 California Penal Code section 1170.3 provides statutory  
17 for the rules of the Judicial Counsel, specifically subsection  
18 (3) on the imposition of concurrent or consecutive sentences.  
19 The rules are codified in the California Rules of Court. Rule  
20 4.425 sets forth the "Criteria Affecting Concurrent Or Con-  
21 secutive Sentences". Subsection (a) sets out "Facts relating  
22 to the crimes,". Subsection (b) sets forth specific limitations  
23 on facts which may be considered to impose a consecutive term.  
24 Facts which are an element of the crime may not be used  
25 (b)(ii).

26 Petitioner hereby argued that the above statutes and  
27 rules create a clear presumption in favor of imposing a



1 concurrent sentence for any additional terms because the  
2 sentencing court is required to perform additional fact-finding  
3 which is beyond the scope of the factual admissions contained  
4 in a plea of guilty or facts found by a jury. Such determinat-  
5 ions are made by preponderance of the evidence in violation  
6 of a defendant's right to trial and due process. As the Cal-  
7 ifornia Supreme Court recognized in Black II:

8           Some state courts have concluded that  
9           if the sentencing scheme creates a  
10          presumption in favor of concurrent  
11          sentences that may be overcome only by  
12          factual findings, the Sixth Amendment  
13          required that those findings be made  
14          by a jury." People v. Black II, supra,  
15          at p. 11050

16          Read as a whole California's sentencing scheme creates  
17          just such a presumption. In those areas of the scheme where  
18          there exists no such presumption the Penal Code makes itself  
19          unambiguous. In those areas consecutive sentencing is made  
20          mandatory. For example Penal Code § 667(a) states, in pertin-  
21          ent part, "The terms of the present offense and each enhance-  
22          ment shall run consecutively".

23          In the instant matter the court imposed consecutive  
24          sentences based upon it's findings that the offenses were  
25          different in nature and "also the stipulation that was entered  
26          into in regard to sentencing.

27          First: in regard to the sentencing stipulation, petition-  
er stipulated to a sentencing exposure not to exceed 13 years  
and 8 months. He did not stipulate that the sentence could  
not be less than 13 years and 8 months.

1       Second: the crimes were not different in nature. Count  
2       1 and Count 3 were assaults in nature. Did the sentencing  
3       court mean to indicate that the crimes involved a different  
4       motive and were therefore different in nature? If so this  
5       constitutes a factual finding of a mental state and violates  
6       Cunningham.

1 Controlling Principals Of Law Applied To Prior Convictions:

2 ¶ "...it is arguable that Almendarez-Torres"  
 3 (Almendarez-Torres v. United States (1998)  
 4 523 U.S. 224 "was incorrectly decided, and  
 5 that a logical application of our reasoning  
 today should apply if the recidivist issue  
 were contested, ...." Apprendi v. New Jersey,  
 supra, at 489-490.

6 In reasoning that Almendarez-Torres was wrongly decided  
 7 Justice Thomas wrote:

8 ¶ "..., one of the chief errors of Almendarez-  
 9 Torres -- an error to which I succumbed  
 -- was to attempt to discern whether a parti-  
 10 cular fact is traditionally (or typically)  
 a basis for a sentencing court to increase  
 an offender's sentence. 523 U.S. 243-244."  
 11 [citation omitted] "For the reasons I have  
 12 given, it should be clear that this approach  
 just defines away the real issue. What mat-  
 13 ters is the way by which a fact enters into  
 the sentence. If a fact is by law the basis  
 for imposing or increasing punishment --  
 14 for establishing or increasing the prosecut-  
 ion's entitlement -- it is an element. (To  
 15 put the point differently, I am aware of  
 no historical basis for treating as a non-  
 16 element a fact that by law sets or increases  
 punishment.) When one considers the question  
 17 from this perspective, it is evident why  
 the fact of a prior conviction is an element  
 18 under a recidivism statute. In deed, cases  
 addressing such statutes provide some of  
 19 the best discussions of what constitutes  
 an element of a crime. One reason frequently  
 20 offered for treating recidivism differently,  
 a reason on which we relied in Almendarez-  
 21 Torres, supra, at 235," [citation omitted]  
 22 , "is the concern for prejudicing the jury  
 by informing it of the prior conviction.  
 But this concern, of which earlier courts  
 23 were well aware, does not make the tradition-  
 al understanding of what an element is any  
 24 less applicable to the fact of a prior convi-  
 ction. See, e.g., Maguire, 47 Md, at 498;  
 25 Sticllles, 156 NY, at 547, 51 NE, at 290<sup>10</sup>."  
 Apprendi, supra, at 521.

26  
 27 "10. In addition, it has been common  
 practice to address this concern by

1       permitting the defendant to stipulate to  
2       the prior conviction, in which case the  
3       charge of the prior conviction is not read  
4       to the jury, or, if the defendant decides  
5       not to stipulate, to bifurcate the trial,  
6       with the jury only considering the prior  
7       conviction after it has reached a guilty  
8       verdict on the core crime." [citation  
9       omitted] "People v. Saunders, 5 Cal.4th  
10       580, 587-588." **Apprendi v. New Jersey, supra,**  
11       **at 521, fn 10.**

12       Almendarez-Torres was wrongly decided and sets an egregious  
13       precedent which opens the door for prosecutorial and judicial  
14       abuse in the unlimited use of any prior conviction. The facts  
15       upon which the United States Supreme Court decided Almendarez-  
16       Torres are distinguishable to that case. The defendant in  
17       Almendarez-Torres "...entered a plea of guilty. At a hearing,  
18       before the District Court accepted his plea, Almendarez-Torres  
19       admitted that he had been deported, that he had later unlawfully  
20       returned to the United States, and that the earlier deportation  
21       had taken place 'pursuant to' three earlier 'convictions' for  
22       aggravated felonies." **Almendarez-Torres, supra, at 227.** There  
23       was no question of the accuracy of the fact finding procedure  
24       because Almendarez-Torres did not dispute the facts...he admitted  
25       them. Further, the subject matter specifically addressed by  
26       the Court in Almendarez-Torres is "the prior commission of a  
27       serious crime". **Almendarez-Torres, supra, at 230.** In the instant  
28       matter the petitioner's prior adult convictions are for two  
29       occasions of Public Intoxication a year apart. These are not  
30       the "serious" crimes addressed in Almendarez-Torres, these are  
31       nuisance crimes of the same caliber as littering and loitering.

32       In reaching their conclusion in Almendarez-Torres the

1 Court delineated what factors were considered:

2 ¶"In assessing petitioner's claim, we have  
3 examined McMillan to determine the various  
4 features of the case upon which the Court's  
5 conclusion arguably turned. The McMillan  
6 Court pointed out: (1) that the statute  
7 plainly 'does not transgress the limits  
8 expressly set out in Patterson,: 477 U.S.  
9 at 86; (2) that the defendant (unlike  
10 Mullaney's defendant) did not face '"a  
11 differential in sentencing ranging from  
12 a nominal fine to a mandatory life sent-  
13 ence,'" 477 U.S. at 87 (quoting Mullaney,  
14 421 U.S. at 700); (3) that the statute  
15 did not 'alter the maximum penalty for  
16 the crime' but 'operates solely to limit  
17 the sentencing court's discretion in select-  
ing a penalty within the range already  
available to it,' 477 U.S. at 87-88; (4)  
that the statute did not 'create a separate  
offense calling for a separate penalty,'  
477 U.S. at 88; and (5) that the statute  
gave 'no impression of having been tailored  
to permit the visible possession finding',  
(possession of a gun), "to be a tail which  
wags the dog of the substantive offense,'  
but, to the contrary, 'simply took one  
factor that has always been considered  
by sentencing courts to bear on punishment..  
and dictate the precise weight to be given  
that factor,' 47 U.S. at 88, 89-90."  
Almendarez-Torres, *supra*, at 242-243.

18 While the above five factors may not have been present in  
19 the Almendarez-Torres case, they most assuredly are an integrall  
20 part in the unlimited use of prior convictions to enhance a  
21 sentence beyond the statutory maximum in California's sentencing  
22 scheme.

23 The Court in Almendarez-Torres was addressing the use of  
24 prior felony convictions of a serious nature. Petitioner has  
25 two prior convictions for being drunk in public..misdemeanors..  
26 crimes of public nuisance...yet he received the same aggravated  
27 sentence as would one previously convicted of a serious or



1 violent felony. In that instance the sentencing court would have  
2 had the option to impose a sentence pursuant to the statute charg-  
3 ing the prior conviction or as an aggravating sentencing factor  
4 pursuant to rule 4.420(c) of the California Rules of Court. But  
5 at least that defendant would have had the right to be charged  
6 and tried on the allegations of the prior conviction. See Penal  
7 Code § 1158. In the instant case the petitioner suffered the  
8 same liability without the protections afforded an offender with  
9 prior felony convictions; i.e., the right to trial and a finding  
10 of beyond a reasonable doubt. This offends due process and  
11 equal protection under the 14th Amendment to the Constitution  
12 of the United States.

13 Petitioner should be afforded the constitutional protections  
14 set forth in *Apprendi*, *supra*, and *Cunningham*, *supra*.

#### 16 CONCLUSION

17 For the reasons set forth herein petitioner's sentence must  
18 be modified to reflect the imposition of the middle term on  
19 Count 1 to a term of 6 years with a one year enhancement for  
20 the use of a knife pursuant to P.C. § 12022(b). All other Counts  
21 must run concurrently for a total aggregate term of 7 years.

22  
23 Dated: 5.23.08

Respectfully Submitted,

24 Matthew Cruz  
Matthew Cruz, In Pro Per



S157871

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

---

In re MATTHEW MANUEL CRUZ on Habeas Corpus

---

The petition for writ of habeas corpus is denied.

George, C. J., was absent and did not participate.

**SUPREME COURT  
FILED**

APR 23 2008

Frederick K. Ohlrich Clerk

---

Deputy

**WERDEGAR**

---

Acting Chief Justice



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW CRUZ,  
Petitioner,

v.

RICHARD SUBIA, (Warden),  
Respondent.

---

DOCKET NO. \_\_\_\_\_

PETITION FOR WRIT OF  
HABEAS CORPUS

(Sentencing Only)

FROM JUDGMENT OF THE SUPERIOR COURT  
IN AND FOR THE COUNTY OF SONOMA  
HONORABLE R.A. CHOUTEAU, JUDGE

Matthew Cruz F-03927  
Mule Creek State Prison  
P.O. Box 409060  
Ione, CA 95640

Matthew Cruz  
Matthew Cruz, In Pro Se

(With aid of inmate legal  
assistant)

BY PERSON IN STATE CUSTODY

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## DECLARATION OF SERVICE BY MAIL

Case Name: In re Matthew Cruz Case Number: \_\_\_\_\_  
I, Gaylin Burleson, hereby certify that I am a citizen of the United States, over the age of 18 years, and am (not) a party to the within action. I am currently incarcerated at Mule Creek State Prison. My mailing address is P.O. Box 409060, Lone California, 95640-9060.

On 6/23/08, I served the following documents:  
**DOCUMENTS SERVED:**

Petition for writ of habeas corpus and Notice of Lodgment of Exhibits

To the following parties:  
**PARTIES SERVED:**

California Attorney General  
455 Golden Gate Ave. #11000  
San Francisco 94102

I enclosed a true copy of said document(s) in a sealed envelope addressed to each of the above persons or parties, and personally handed the envelope into the custody of the Correctional Officer in charge of outgoing legal mail, for delivery to the United States Postal Service, in accordance with established institutional mailing procedures.

I, Gaylin Burleson, hereby certify and declare under penalty of perjury the foregoing is true and correct. Executed on 6/23/08, at Lone CA, by:

Gaylin Burleson, Declarant



Matthew Cruz F-03927  
Mule Creek State Prison  
P.O. Box 409060  
Ione, CA 95640

May 21, 2008

Clerk of the Court  
U.S. District Court  
Northern District of California  
450 Golden Gate Ave.  
San Francisco, CA 94102

E-filing

MMC

CV 08

2793

Re: Filing Writ Petition.

Dear Clerk:

Enclosed you will find a petition for writ of habeas corpus, volume (PR) of supporting exhibits and Notice of Lodgment of Exhibits for filing in your court. I have also enclosed a self addressed, Stamped envelope and an extra cover page of the writ for comforming and returning to me.

I am an indigent state prisoner. Forma Paupris forms are being processed by the prison trust account office and will be mailed as soon as this is completed. I apologize that the pages are not bound, I have no binding material in this prison.

Sincerely,

*Matthew Cruz*

Matthew Cunn F-03925  
Mule Creek State Prison  
PO Box 409660  
Jones, Ca. 95660  
CJ-162M

Joseph M. J.

RECEIVED  
JUN 9 0 2008

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

San Francisco, Ca. 941

U.S. District Court  
Northern District of California  
450 Golden Gate Ave

